

Agency Deference & Brand X

A. Chevron Deference

The U.S. Supreme Court established a two-step analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) [hereinafter *Chevron*] for evaluating whether an agency's interpretation of a statute it is entrusted to administer is lawful.

1. Chevron "Step One"

Chevron step one requires that the reviewing court determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Congressional intent may be discerned from the plain terms of the statute and by employing the traditional rules of statutory construction. *See id.* at 843 n.9.

2. Chevron "Step Two"

If the statute is silent or ambiguous, however, the reviewing court must decide at Chevron step two "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. A permissible construction of the statute is not necessarily the best interpretation of the statute or the interpretation that the reviewing court would adopt if interpreting the statute in the absence of an existing agency construction. *Id.* at 843 n.11; *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) [hereinafter *Brand X*].

The Supreme Court distinguished between explicit and implicit statutory gaps in articulating the standard for determining whether an agency construction is permissible under *Chevron* step two. It explained that an explicit gap in the statutory language constitutes "an express delegation to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 844. Any such interpretations are given controlling weight, unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* Where a gap is implicit, however, a court may not substitute its own construction of a statutory provision insofar as the construction is a "reasonable" policy choice for the agency to make. *Id.* at 844-45.

An agency's interpretation is due Chevron deference irrespective of whether it is inconsistent with prior practice. *See Brand X*, 545 U.S. at 981. Policy reversals, for example, only need to be adequately explained by the agency. *Id.*

3. Agency Interpretations Subject to Chevron Deference

The Supreme Court clarified in *United States v. Mead*, 533 U.S. 218 (9th Cir. 2001) that not all agency interpretations of a statute qualify for *Chevron* deference. Only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority" does Chevron deference apply. *Id.* at 226-27. In interpreting *Mead*, the Ninth Circuit has treated "the precedential value of an agency action as the essential factor in determining whether Chevron deference is appropriate." *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006) (emphasis in original). Specific examples of agency interpretations meriting Chevron deference identified by the Supreme Court include notice-and-comment rulemaking and formal adjudications. *Mead*, 533 U.S. at 230.

B. Modified Skidmore Deference

Other agency constructions, such as “interpretations contained in policy statements, agency manuals, and enforcement guidelines,” are “beyond the Chevron pale,” but may nonetheless merit some deference under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Id.* at 235 (quoting Christensen, 529 U.S. at 587). Applying Skidmore deference, the weight accorded to such an administrative judgment “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140.

C. Chevron and Skidmore Deference as Applied to Our Agency

The principles of Chevron deference apply to some, but not all of our agency’s interpretations of the Immigration and Nationality Act (“INA”). The INA provides that the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” INA § 103(a)(1). Adjudicative decisions and regulations issued by the Attorney General are therefore accorded *Chevron* deference. See *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947-48 (9th Cir. 2007); *Mejia v. Gonzales*, 499 F.3d 991, 996 (9th Cir. 2007).

The Attorney General, while retaining ultimate authority, has vested the Board of Immigration Appeals (“BIA”) with the power to provide, through precedent decisions, “clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.” 8 C.F.R. § 1003.1(d)(1). The Supreme Court has accordingly recognized that the BIA should be granted Chevron deference “as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication” *Aguirre-Aguirre*, 526 U.S. at 426 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987)). Not all BIA opinions merit Chevron deference, however. Chevron deference is appropriate only when the BIA intended to issue a precedential decision. *Camins v. Gonzales*, 500 F.3d 872, 879 (9th Cir. 2007). Unpublished BIA decisions issued by a single board member are subject to Skidmore deference. See *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 920-24 (9th Cir. 2006) (as amended).

D. Brand X

The Supreme Court recently considered the effect of an agency’s statutory interpretation that conflicted with a circuit court’s earlier construction in *Brand X*, *supra*. It held that a circuit court’s “prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Brand X*, 545 U.S. at 969 (emphasis added). Prior precedent from a circuit court holding that a statute unambiguously forecloses its interpretation by the agency under Chevron step one will therefore continue to displace a conflicting agency construction. See *id.* at 982-83. Where the statute is ambiguous, however, the circuit court is not bound by the stare decisis effect of its prior precedent; rather, it must defer to the agency’s interpretation under Chevron step two so long as it is a permissible construction of the statute. See *id.* at 984-86.

Two circuit courts have applied *Brand X* in reviewing its prior precedent when faced with a conflicting decision subsequently published by the BIA. See *Gonzales v. Dep’t of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007); *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007). The Ninth Circuit, for example, recently concluded that Brand X mandated its review of *Perez Gonzales v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) in the light of the BIA’s subsequent decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). See *Gonzales*, 503 F.3d at 1236. The Ninth Circuit determined that its decision in *Perez Gonzales* was based on a finding of statutory ambiguity that left room for agency discretion. See *id.* at 1238. Because the Ninth Circuit found the BIA’s construction of the statute in *Matter of Torres-Garcia* to be permissible, it deferred to the BIA and found that it was bound by the BIA’s decision. See *id.* at 1241-42.

E. Possible Effect of Brand X on the Decisions of Immigration Judges

Brand X leaves immigration judges in a quandary when they are faced with conflicting circuit and BIA precedent on an issue of statutory interpretation and must decide which appellate court to look to for guidance in deciding their individual cases. *Brand X* is clear in that immigration judges must follow prior circuit court precedent where the circuit court found that the terms of the statute are unambiguous under *Chevron* step one. 545 U.S. at 982-83. Judicial interpretations of unambiguous statutes are never subject to subsequent statutory interpretation by our agency.

The proper course of action is less certain, however, (1) where the prior circuit court decision was decided in the absence of an agency interpretation due *Chevron* deference, or (2) where the prior circuit court decision found that the statute is ambiguous under *Chevron* step one. The following will discuss possible options when either scenario arises in an individual case before an immigration judge.

1. Prior Circuit Court Decision Did Not Employ Chevron Deference

A circuit court is frequently called upon to interpret statutes in the absence of an agency interpretation due *Chevron* deference. Such decisions often are not explicit as to whether the statutory construction was mandated by the plain terms of the statute or was merely what the circuit court deemed to be the best interpretation of an ambiguous statute. Determining whether a prior circuit court's holding was required by the plain meaning of the statute under *Chevron* step one is arguably best left to the circuit court. Seemingly ambiguous statutes are frequently deemed "unambiguous" by a circuit court by employing the tools of statutory construction, which, for example, allow for the consideration of legislative history and require avoidance of constitutional issues. Circuit courts may also reverse course and find that their prior decision was based on the plain terms of the statute under *Chevron* step one, despite language to the contrary in the original decision. An immigration judge may well be advised to wait until the circuit court has the opportunity to reconsider its prior decision in the face of an intervening BIA interpretation due *Chevron* deference before attempting to make this finding.

An intervening published BIA decision may, nonetheless, assert either expressly or implicitly that the statute at issue is ambiguous in offering a statutory interpretation in conflict with the prior circuit court decision. Immigration judges may be obliged to follow a valid exercise of the BIA's authority to interpret an ambiguous statute, see discussion *infra*, and therefore may choose to adopt the BIA's interpretation in anticipation that the Circuit Court will ultimately agree that the statute is ambiguous under *Chevron* step one.

2. Prior Circuit Court Decision Found the Statute Is Ambiguous

Policy reasons favor adopting a conflicting BIA interpretation of an ambiguous statute even in the face of prior circuit court precedent. The Supreme Court has repeatedly stressed the primacy of an agency's interpretation of ambiguous statutes, especially immigration laws. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the Immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988) (internal quotation marks omitted))). Congress, by leaving the statute ambiguous, delegated the authority to the agency, not the federal courts, to fill this statutory gap. See *Chevron*, 467 U.S. at 843-44. Ambiguous statutes are open to multiple interpretations and the policy choices made by the agency in selecting which interpretation to adopt must be deferred to insofar as it is permissible.

Immigration judges may, nonetheless, be advised to exercise caution before adopting a BIA interpretation of an ambiguous statute that conflicts with prior circuit court precedent. *Brand X* did not hold that a contrary agency interpretation of an ambiguous statute automatically trumps a circuit court's prior precedent. A contrary agency

interpretation only trumps a circuit court holding under *Brand X* if it is first determined to be permissible under *Chevron* step two. If this determination must necessarily be made before the stare decisis effect of prior circuit court precedent may be ignored, immigration judges would arguably be placed in the awkward position of judging the reasonableness of the policy decisions made by the BIA, their reviewing court.* This line of reasoning, however, may be fatally flawed as it presupposes that immigration judges are not part and parcel of the agency in which they serve. It would also inevitably lead to an inter-agency conflict where immigration judge decisions are automatically reversed by the BIA.

* Making such a determination, moreover, may be beyond the authority of an immigration judge. The *Chevron* two-step analysis was articulated by the Supreme Court as a guide for federal courts, not the agency, in determining when deference to an agency's statutory construction is required. The BIA does not have to engage in the *Chevron* analysis if it decides to reject a circuit court's construction of an ambiguous statute or to reverse course and issue an interpretation contrary to its prior statutory constructions. Policy reversals, for example, only need to be "adequately explained" by the agency. *Brand X*, 545 U.S. at 981. *Chevron* does not anticipate that agency adjudicators will be engaging in its two-step analysis.